

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY LANE,

Defendant-Appellant.

UNPUBLISHED

August 19, 2014

No. 315604

Calhoun Circuit Court

LC No. 2012-001823-FH

Before: SAAD, P.J., and OWENS and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), and disorderly person (jostling), MCL 750.167(1)(l). We affirm.

Defendant first argues that he was entitled to a specific unanimity instruction for the assaulting, resisting, or obstructing a police officer charge. Defense counsel, however, expressly approved the jury instructions on the record when she stated that she did not have any objections to the instructions. *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). This express approval of the instructions constitutes a waiver of any instructional error claimed on appeal. *Id.*

Alternatively, defendant argues that defense counsel was ineffective for failing to request a specific unanimity instruction. We disagree. Where there is evidence of multiple acts by a defendant that would satisfy the actus reus element of the charge offense, a specific unanimity instruction is required if the acts are “materially distinct” or if “there is reason to believe the jurors might be confused or disagree about the factual basis of the defendant’s guilt.” *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994). Otherwise, a general instruction to the jury that its decision must be unanimous is sufficient. *Id.* In this case, although defendant performed multiple acts that could have satisfied the actus reus of assaulting, resisting, or obstructing a police officer, the acts were so similar in nature and time that they constituted one continuous transaction, and thus, a specific unanimity instruction was not required. *Id.* at 528-529. Because a specific unanimity instruction was not required, we find that defense counsel was not ineffective for failing to request one. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (“Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.”).

Defendant next argues that he was denied a fair trial when the prosecutor improperly asked him to comment on the truthfulness of two prosecution witnesses. We disagree. Because defendant failed to object to the alleged misconduct, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). While it was error for the prosecution to ask defendant to comment on the credibility of the two police officers, the error here was harmless because defendant maintained throughout the trial that the police officers were liars and that they singled out defendant for no apparent reason. *People v Knapp*, 244 Mich App 361, 384-385; 624 NW2d 227 (2001). Further, any prejudicial effect could have been cured by a timely objection and curative instruction. *People v Dobeck*, 274 Mich App 58, 68; 732 NW2d 546 (2007).

Additionally, defendant argues that the prosecution's questions in this regard improperly shifted the burden of proof. We disagree. The prosecutor's questions did not shift the burden of proof because the record indicates that they were an attempt to attack the credibility of defendant's theory that the police officers were lying and that they singled out defendant for no apparent reason. See *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005) (stating that "attacking the credibility of a theory advanced by a defendant does not shift the burden of proof"). Therefore, we find that defendant's claims of prosecutorial misconduct do not warrant reversal.

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly